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In the
Supreme Court of the United States

October Term, 1973

No. 73-826

E. ROSS KING, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner E. Ross King respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit in the case of United States of America v. E. Ross King, No. 73-1119, entered on October 1, 1973. Rehearing denied on October 16, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Colorado.

Jurisdiction

The Judgment of the Court of Appeals for the Tenth Circuit was entered on October 1, 1973. A timely Petition for

Rehearing was denied on October 26, 1973 and this Petition for Certiorari was filed within thirty (30) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the trial court committed reversible error when it permitted Petitioner's former attorney to testify and thereby violate the attorney-client privilege. This testimony was given during the Petitioner's Criminal Jury Trial.

2. Whether the Tenth Circuit or the Seventh and Eighth Circuits have correctly interpreted Rule 29(a) of the Federal Rules of Criminal Procedure.

Constitutional and Statutory Provisions Involved

Amendment V, United States Constitution. No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Rule 29(a) Federal Rules of Criminal Procedure. What standard of review must an Appellate Court undertake in reviewing a criminal trial record wherein the issue of a Rule 29(a) Motion for Judgment of Acquittal is raised on appeal. Should the Appellate Court review the record as it stood at the end of the government's case in chief to determine whether or not the Motion for Judgment of Acquittal should have been granted or should it review the entire evidentiary record at the conclusion of the trial to determine whether or not a Judgment of Acquittal should have been entered.

Statement of the Case

On September 21, 1972, the Petitioner herein was indicted on a four count indictment filed in the United States District Court for the District of Colorado (Volume III, pg. 1)*

*The record on appeal to the Tenth Circuit Court of Appeals constituted three volumes. All references to said record hereinafter will merely indicate volumes and page numbers or exhibit numbers thereof.

Two counts were subsequently dropped and the revised indictment containing two counts was filed on November 28, 1972, in the United States District Court for the District of Colorado. (Volume III, pg. 3). Both counts of the revised indictment charged the Petitioner with violations of 18 U.S.C. § 656 (misappropriation of bank funds by an officer, director, agent or employee) and Count II further charged a violation of 18 U.S.C. § 2 (aiding and abetting in the misappropriation of bank funds). The trial was held before the Honorable Fred M. Winner, United States District Judge for the District of Colorado with a twelve man jury setting on November 27, 1972. The jury returned a verdict of guilty on both counts and the Petitioner E. Ross King filed his Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on December 26, 1972, and subsequently perfected his appeal to that Court.

Prior to the indictment, the Petitioner, E. Ross King, and his brother, Paul King, were directors of the Kiowa State Bank of Kiowa, Colorado. In addition to being a director, the Petitioner's brother, Paul King, was also the President of the Kiowa State Bank. The Petitioner resigned his position as director of the Kiowa State Bank on October 17, 1970. Count I of the indictment stated that the Petitioner and his brother, Paul King, acting as President of the Kiowa State Bank on March 2, 1970, engaged in a loan transaction of $50,000.00 of the Kiowa State Bank funds to the Apple Cross Farms, Inc. (Exhibit 2.3 and 2.4, Volume III, pgs. 29-30). Apple Cross Farms was a corporation having as directors the Petitioner and his brother, Paul King. The proceeds of the $50,000.00 loan eventually went to the Petitioner and his brother, Paul King, in approximately equal shares. The only evidence introduced in the government's case in chief to prove that the Petitioner was a director on March 2, 1970, were the minutes of a March 19, 1970, Kiowa State Board of Directors meeting (Exhibit 2.2, Volume III, pg. 28) which proved the attendance of the Petitioner at that meeting in his capacity of director. The Tenth Circuit Court of Appeals was advised in oral argument and by exhibits attached to the Brief of Petitioner that the March 19, 1970, meeting never took place.

Count II of the indictment stated that the Petitioner's brother, Paul King, on June 14, 1971, while President of the Kiowa State Bank loaned $25,000.00 of the bank's money to a Mr. A. Paul Williams secured by a personal promissory note (Exhibit 7.4 and 7.5, Volume III, pgs. 51-52). Part of the proceeds of the $25,000.00 loan allegedly went to the Kiowa Real Estate Investment Trust which had among its principals, Paul King and the Petitioner. There was, however, at the conclusion of the government's case in chief, no evidence showing the transactions involved in Count II were criminal. It was, therefore, impossible as the record stood at the conclusion of the government's case in chief on Count II, to find that the brother, Paul King, had in fact been a principal in the commission of a crime or that the Petitioner herein aided and abetted in the performance of such crime.

During the government's case in chief, The Petitioner's former attorney, a member of the Colorado Bar, was called upon to testify against the Petitioner. (Volume I, pgs. 40-70). In addition to his testimony, the government also obtained certain documentary evidence from this attorney, which was introduced at the Petitioner's trial (Exhibit 2.3 of Volume III). The record clearly establishes that this attorney was the Petitioner's attorney for a number of years and was instrumental in setting up the various corporate entities involved in this case. This attorney was Mr. King's attorney up to the time of the rendering of the indictment and was initially his legal advisor in this case. Subsequent to such time, this attorney referred the Petitioner to another attorney in Denver, Colorado, to act as defense counsel in this matter. The record does not show that at any time during the former attorney's testimony there was a knowing waiver made by the Petitioner which would have rendered admissible this testimony. The testimony of the former attorney clearly grew out of, and was solicited by the prosecution because, it related to business transactions of the Petitioner which had been undertaken with the assistance and advice of the former attorney. Petitioner was convicted and sentenced to 50 months, with 48 months suspension

and probation and 2 months in a work release program, plus a $2,500.00 fine.

The United States Court of Appeals for the Tenth Circuit affirmed the trial court's judgment and sentence holding (1) that there was sufficient evidence at the conclusion of all of the evidence to support a jury finding of guilty on both Counts of the indictment; and (2) that the Petitioner was not prejudiced at trial when his former attorney testified as a government witness; and (3) that the representation the Petitioner received from his retained trial counsel did not violate his constitutional rights to the effective assistance of counsel.

Reasons for Granting Certiorari

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Tenth Circuit Opinion reaches two important legal results:

First, the Court holds that the record is void of any prejudicial error as a result of the Petitioner's former attorney testifying as a government witness in his criminal jury trial, and second, that the standard of review used by the Tenth Circuit when considering an appeal based upon Rule 29(a) of the Federal Rules of Criminal Procedure must be based upon a review of the entire record at the close of all of the evidence.

The main issue presented by the Petitioner to the Court of Appeals for the Tenth Circuit was whether or not the trial court committed "plain error" when it permitted the Petitioner's former attorney to testify against Petitioner at his trial. The Tenth Circuit handled this particular phase of the argument, which appears at pages 10 and 11 of its Opinion when it states at page 11 (Appendix pg. 7a):

> "Rather, the *record* indicates to us that the failure of trial counsel to interpose any objection based on an alleged attorney-client privilege when the defendant's erstwhile attorney was called as a Government witness *was intentional* and a *part of trial strategy*, wherein trial counsel

> hoped to elicit favorable testimony upon cross-examination which would more than offset any damaging testimony given by the witness on direct examination." (Emphasis Supplied)

It is respectfully submitted to this Court that a review of the record as it appeared before the Tenth Circuit does not supply a *scintilla of evidence* to support the statement of the Appellate Court. Rather the Tenth Circuit's statement is an unsupported conclusory statement of fact. In addition to the conclusion being unsupported by the record, there is lack of cogent argument or authorities by the United States Attorney in his brief or oral argument before the Tenth Circuit on this particular point. Based on this conclusion the Tenth Circuit ruled that the action of the trial counsel constituted a "knowing waiver" by the Petitioner of his attorney-client privilege and as a result he cannot, on appeal, invoke any claimed error under the principle of the Tenth Circuit case of *Young v. Taylor*, 466 F. 2d 1329.

A review of the *Young* case indicates it is readily distinguishable on its facts from the case at bar in that the *Young* case was a civil fraud action wherein *no* constitutional issues were raised nor was the Court asked to invoke the "Plain Error Rule." Secondly, in the *Young* case the Tenth Circuit Court of Appeals found, at page 1332, that the attorney acted as a participant and his consultation and subsequent testimony was as an interested party and therefore the attorney-client privilege was not a factor.

The record before the Tenth Circuit clearly indicates that these were not the facts at bar. The facts before the Tenth Circuit preclude any inference or conclusion that the Petitioner made a knowing waiver of his attorney-client privilege. It was the Petitioner's position before the Tenth Circuit and it is still his position that the communication between the former attorney and the Petitioner constituted a privilege communication which must remain sacrosanct. (See Wharton's Criminal Evidence 13th Edition § 556 through 561 and the over 200 cases footnoted therein.) Therefore, any elaboration by Petitioner's

former attorney at the criminal trial of his case had to be a violation of the attorney-client privilege. It is respectfully submitted to this Court based upon its own knowledge and experience the measurable damage and prejudice that was created in the minds of the jury against the Petitioner when his former attorney took the stand as a government witness and testified concerning certain business dealings which the government alleged were criminal in character. The very fact that a former attorney is called by the prosecution and takes the stand has to have a distinct and compelling impact on the minds of a jury. It is not hard to imagine a juror, seeking conviction saying to his fellows; "He must be guilty, even his attorney is against him." The United States Supreme Court, in several landmark cases, has forcefully stated the position for all times concerning the attorney-client privilege. (See *Vogel v. Gruaz*, 110 U.S. 311 (1884); *Connecticut Mutual Life Insurance Company v. Schaefer*, 94 U.S. 457, 458 (1876); *Stockton v. Ford*, 52 U.S. (11 Howard) 232, (1850), as the United States Supreme Court stated in the *Stockton* case at page 247:

> "There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it."

The former attorney who testified against his client had practiced law in Denver for a considerable period of time. He had been Petitioner's attorney for a lengthy period before the criminal indictment was returned. He incorporated the Apple Cross Farms, Inc. and was in fact its president at one time. He signed the $50,000.00 promissory note involved in Count I (Exhibit 2.4). He incorporated the Jefferson Investment Company (Exhibit 5.2) which the government urged upon the jury was nothing more or less than a conduit through which illegal

monies were passed for the benefit of the Petitioner and his brother. The former attorney further provided legal assistance in forming the Kiowa Real Estate Investment Trust (Volume I, pgs. 47-48) and prepared the Offering Circular of the company (Exhibit 9). He had a general and intimate knowledge of most if not all of the Petitioner's business transactions and obviously rendered advice and counsel in these transactions. Yet, in the face of this, this attorney was allowed to testify without any objection being raised by the former attorney, by Petitioner's trial attorney or by the trial court (Volume I, pgs. 40-41). The Petitioner's trial attorney should have objected at the commencement of the former attorney's testimony. Or the attorney/witness himself should have declined to testify because his testimony would violate the cannons of professional ethnics. In the eyes of the jury, who would be better qualified to testify about and against the Petitioner than his own former attorney. One cannot help speculate about the jury's post trial attitude towards attorneys as a result of the proceedings. It is rather intriguing to speculate as to why the former attorney undertook to violate his clients confidences. It is difficult to believe he undertook these actions without some motive. As this Court said in 1876 there are specific and compelling reasons for not allowing any leeway in maintaining the inviolate status of attorney-client communication. (Connecticut Mutual Life Insurance Supra). See also *State v. Quires*, 1 Tyler 147 Vt. (1801) and *State v. Leigh*, 178 Kansas 549, 289 P.2d 774 (1955). C. Wright on Federal Practice and Procedure (Volume III, § 856) states that the Plain Error Rule and the relief sought thereunder is based upon the theory that:

> "It is not a miscarriage of justice to convict a guilty man, but if he is convicted in a way inconsistent with fairness and integrity of judicial proceedings then the Courts should invoke the plain error rule in order to protect their own public reputation." (See also Wright v. United States, 301 F.2d 412 (10th Cir. 1962).

It is respectfully submitted that the case at bar is exactly a situation wherein the "plain error rule" should be invoked and

the matter should be resubmitted to the trial court for a retrial. The Tenth Circuit held on page 11 of its opinion that part of the former attorney's testimony was confidential (Appendix pg. 7a):

> "Elaborating a bit more on this particular phase of the controversy, it is doubtful *that the bulk of the testimony* from defendant's erstwhile attorney was in fact privileged." (Emphasis supplied).

It appears the Tenth Circuit is saying that some of the testimony was privileged, therefore it logically follows that all of the testimony was tainted as a violation of the attorney-client privilege. As the Tenth Circuit held in the case of *Wilcoxon v. United States,* 231 F.2d 384, 386 (10th Cir.)–Cert *denied. 351 U.S. 943:*

> "It is the general rule of ancient origin that confidential communication between attorney and client in the course of professional employment are privileged and cannot be used in Evidence against the client. The rule is for the protection of the client in order that he may be free to disclose to his attorney matters of confidence and importance without fear that the trust will be violated."

The holding of the Tenth Circuit in this case on the issue of the attorney-client privilege flies in the face of its own decision enunciated in *Wilcoxon.* In addition there is obviously a conflict with pronouncements of this court on the issue of the attorney-client privilege. Therefore the Petitioner respectfully requests that this Court consider granting certiorari in this matter for a hearing on the merits and a review of the evidentiary record that was utilized by the Tenth Circuit in making its determination.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEALS AS TO THE PROPER STANDARD OF REVIEW TO BE INVOKED BY AN APPELLATE COURT IN REVIEWING THE LEGAL ISSUE OF WHETHER OR NOT A JUDGMENT OF ACQUITTAL

SHOULD HAVE BEEN GRANTED PURSUANT TO RULE 29(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

It is the Petitioner's contention that at the conclusion of the government's case in chief the government had totally failed in its burden of proof beyond a reasonable doubt to establish the elements enunciated in Count II of the indictment. More specifically the record is devoid of any evidence either testimonial or documentary that the Petitioner was an officer, director, agent or employee of a national bank on June 14, 1971. Not being an officer, agent, director or an employee of a national bank he was, therefore, unable to aid and abet in the commission of an embezzlement from such bank. (Volume II, pgs. 6, 99 and Exhibit 2.2)

When one reviews the documentary and testimonial evidence cited herein it becomes obvious that the prosecution's case fails totally to prove one of the essential elements of the crime charged pursuant to Count II of the indictment. On the contrary, a review of the evidence clearly shows that the Petitioner was not a director of the Kiowa State Bank on June 14, 1971.

The testimonial evidence shows that the Defendant was a director in December of 1969 and January of 1970. The documentary evidence, exhibit 2.2 shows that the Petitioner signed the minutes of the Kiowa State Board meeting on March 19, 1970. Clearly the record before the Court and jury showed that as involves Count II of the indictment the Petitioner was not in fact capable of violating 18 U.S.C. § 656 in that he was not an officer, director, agent or employee of a national bank in June, 1971. In addition, the jury in finding him guilty on Count II of the indictment must have based its theory on a violation of Title 18, U.S.C. § 2 which is the aiding and abetting statute. The Tenth Circuit case law and the prevailing case law throughout the United States is that although it is unnecessary to convict a person as a principal it is necessary to prove beyond a reasonable doubt the commission of a crime by a principal, *United States v. Dufur,* 461 F.2d 662 (10th Cir. 1972). It is also

necessary that the prosecution prove that the accused aided or abetted or participated in the offense charged and sought to make the scheme succeed *United States v. Harris,* 441 F.2d 1333, 1336 (10th Cir. 1971). A review of the record shows that no principal was involved in the crime charged in Count II of the indictment. With these factual and legal principals in mind the Court erred when it denied Petitioner's Motion for a Judgment of Acquittal on Count II at the conclusion of the government's case in chief. Because of this error the Petitioner was placed in the position of defending on both counts. If the Court had ruled properly on a Rule 29(a) Motion for Acquittal on Count II, then the Petitioner would have conducted his defense on Count I in a much different manner. The present Tenth Circuit case law regarding Rule 29(a) and the Waiver Doctrine is graphically enunciated in *United States v. Bedwell,* 456 F.2d 448 (10th Cir. 1972). The Petitioner is aware of the fact that the current Tenth Circuit case law is the majority view of the circuits in the United States. However, the majority view on Rule 29(a) motions is under attack and is the type of interpretation which is not necessarily blessed with the best reasoning and certainly is not grounded in fundamental fairness.

Petitioner's research shows the following jurisdictions have adopted the position that the appellate court should review the record as it stood at the end of the prosecution's case in chief when considering an appellant's allegation that the trial court erred in failing to grant the Petitioner's Motion for Acquittal. *United States v. Burton,* 472 F.2d 757, 763 (8th Cir. 1973); *United States v. McIntryre,* 467 F.2d 274, 276 (8th Cir. 1973) (Footnote 1); *Cephus v. United States,* 324 F.2d 893, 897 (D.C. Cir. 1963); *Franklin v. United States,* 330 F.2d 205, 208 (D.C. Cir. 1964); *United States v. Rizzo,* 416 F.2d 734, 736 (7th Cir. 1969) (Footnote 3) (Opinion by Judge Castle). *But see United States v. Tubbs,* 461 F.2d 43, 45 (7th Cir. 1972) (Opinion by Judge Castle). In the Fifth Circuit, an opinion by Chief Judge Brown at least intimates that the Fifth Circuit may have eliminated the waiver doctrine by reliance on the "plain error rule." *United States v. Pitts,* 428 F.2d 534, 535 (5th Cir. 1970). Petitioner did not research the question in all state jurisdictions

but did locate the following state cases in support of elimination of the waiver doctrine of Rule 29(a). *People v. Valerio,* 14 Cal. App. 3d 176, 92 Cal, Rptr. 82 (1970); *State v. Moffa,* 42 N.J. 258, 200 A.2d 108 (1964); *People v. Baker,* 19 Mich. App. 480 (1969) (dictum); *State v. Rocker,* 52 Hawaii 336, 475 P.2d 684 (1970) (Dissenting opinion by Justice Levinson); *State v. Stuart,* 51 Hawaii 656, 466 P.2d 444 (1970) (Concurring opinion by Justice Levinson). See C. Wright, 2 FEDERAL PRACTICE AND PROCEDURE § 469 (1969); Comment, *The Motion For Acquittal: A Neglected Safeguard,* 70 Yale L.J. 1151 (1961).

If we assume that our judicial process is that, a process and not a contest, then the arguments attacking the Rule 29(a) waiver doctrine are very persuasive. The excellent 1961 Yale Law Review article which appears to have started the entire debate has framed the problem very well;

> "The waiver doctrine thus imposes an enormous responsibility on defense counsel whose motion is denied. In order to present his client's evidence to the jury he must waive what may be a legal ground for reversal. But if he rests his case, his client is almost certain to be convicted by the jury, so that everything will rest on the appeal. Obviously, a doctrine which imposes this kind of responsibility on the defense lawyer maximizes the role of counsel and prejudices the defendant who is badly represented.
>
> Though appellate courts are insulated from some of the pressures affecting trial judges, a convicted defendant can rarely be certain of appellate reversal. Not only will the court construe the evidence in favor of the verdict, but the standard of sufficienty is unsettled in some jurisdictions and any standard is broad enough to permit contrary decisions on identical facts."

Review of the record at the close of the government's case shows that the government had completely failed to prove Count II. The trial court erroneously refused to grant a Motion for Acquittal. The Petitioner's trial attorney had to make a gambler's choice under the Tenth Circuit waiver doctrine. He

could rest, and almost certainly the Petitioner would be convicted on both counts. True he had an appeal to the Tenth Circuit but only on the basis that all of the evidence would be considered most favorably to the prosecution.

In the alternative, the Petitioner could put on his case in chief. He would, however, be obligated to spell out with particularity to the prosecution what the weaknesses in the prosecution's case when he made his arguments in support of a Motion for Acquittal at the close of the government's case in chief. Then the Petitioner would, in all likelihood, have to offer himself for testimonial cross-examination and afford the prosecutor the opportunity to shore up the essential elements of crime with the Petitioner's own testimony. The alternatives as presently presented to Rule 29(a) Motion for Judgment of Acquittal with the accompanying waiver doctrine as enunciated by the Tenth Circuit certainly does disservice to our accusatorial system as Justice Frankfurter said in United States Supreme Court case *Watts v. Indiana*, 338 U.S. 49, 54 (1949):

> "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscow, the Development of Present-Day Criminal Procedures in Europe and America, 48 Harv. L. Rev. 443, 457-58, 467-473 (1935). Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown, c. 46, § 34 (8th ed., 1824)."

In short, Petitioner was damned if he did and damned if he did not. If he failed to put on his case, he lost on two counts. If he put his case on, he explained to the prosecutor the weaknesses

in the government case as he saw them and gave the prosecution a chance to firm up his case. The prosecution did just that with alacrity. (Volume II, pg. 99).

As discussed above, the testimonial evidence presented by the prosecution (Volume II, pgs. 6 and 22) totally failed to prove, beyond a reasonable doubt, that the Petitioner was "an officer, director, agent or employee of [a] ... bank," (18 U.S.C. § 656) on March 2, 1970. The documentary evidence was another thing. Exhibit 2.2, Volume III, pg. 28 clearly implied that the Petitioner was a director on March 19, 1970, hence also on March 2, 1970. There was, however, a counter argument. The minutes of monthly meetings were prepared after the fact. (Volume I, pg. 37). The Petitioner attended meetings for which he did not sign minutes, (Volume I, pg. 38)* and arguably the reverse could also be true. In addition, the Petitioner did not recall attending the March 19, 1970, board meeting. (Volume II, pg. 99)

The Petitioner's attorney obviously decided he must risk convicting the Petitioner out of his own mouth on Count I to make sure he prevailed on Count II. The point here is that Petitioner might reasonably have rested his case if the trial court had not erred in the Count II ruling at the end of the prosecution's case. (Volume II, pgs. 73-74).

If we assume the Court had granted the Petitioner's Motion for Acquittal on Count II, then two intriguing possi-

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*Cross Examination of V. A. Backlund, Jr.

Q. Sir, I hand you the Kiowa State Bank minutes. I refer you to the directors' meeting dated June 25, 1970, and ask you if Mr. E. Ross King's name–signature–appears thereon?
A. No, sir, it does not.
Q. Does it indicate that he was present at this meeting?
A. Yes, sir.
Q. Referring now to the June 23, 1970, meeting, do you find E. Ross King's signature affixed to the directors' meeting?
A. No, sir.
Q. Does it appear that he attended that meeting?
A. Yes, sir.

bilities present themselves. The Petitioner could have rested his case and contended that the prosecution had failed to prove, beyond a reasonable doubt, that based on the following evidence the Petitioner was a director on March 2, 1970.

The Petitioner was a director in December of 1969, and January of 1970 (Volume II, pg. 6); that he resigned sometime before June 14, 1971 (Volume II, pg. 22); and that he may have resigned in March of an undesignated year prior to June 14, 1971 (Volume II, pg. 22). That leaves the question of the Petitioner's directorship in doubt on March 2, 1970, as he could have resigned on March 1, 1970, except for Exhibit 2.2. The prosecution had, however, failed to prove that the Petitioner signed the minutes of the March 19, 1970, board meeting or was a director then. This fact was proved by cross examination of the Petitioner. (Volume II, pg. 99). Without that proof, Petitioner's counsel could have argued that nothing in the prosecution's case had proven, beyond a reasonable doubt, that the Petitioner was a director on March 2, 1970, except Exhibit 2.2 and they failed to show that the Petitioner signed the March 19, 1970, minutes. That coupled with the Backlund testimony which showed a shoddy and questionable procedure in keeping board minutes and the way in which they were signed, could have cast doubts on Exhibit 2.2.

CONCLUSION

Amendment V of the United States Constitution provides, in essence, that no citizen of this country shall be convicted out of his own mouth. That basic precept is the cornerstone of a great many of our constitutional liberties and guarantees. It was violated twice in Petitioner's trial.

First, when the Petitioner's alter ego, his former attorney, testified against him. *cf. State v. Quires,* 1 Tyler 147 (Vt. 1801).

Second, when because of the incorrect interpretation of Rule 29(a) by the Tenth Circuit, the Petitioner was obliged to complete the government's case via his own cross-examination, after telling the government why they had failed to prove their case.

For the foregoing reasons, a writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals

APPENDIX A

Opinion of Court of Appeals

Filed United States Court of Appeals, Tenth Circuit,
October 1, 1973, Howard K. Phillips

United States Court of Appeals, Tenth Circuit

September Term, 1973

No. 73-1119

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

E. ROSS KING, *Defendant-Appellant.*

Appeal from the United States District Court
For the District of Colorado
(D.C. No. 72-CR-279)

Paul D. Cooper, Assistant United States Attorney, (James L. Treece, United States Attorney, on the brief), for Plaintiff-Appellee.

John B. Speight (Hanes, Carmichael, Johnson, Gage & Speight, on the brief), for Defendant-Appellant.

Before LEWIS, Chief Judge, and BARNES* and McWILLIAMS, Circuit Judges.

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*Senior Circuit Judge of the Ninth Circuit, sitting by designation.

McWILLIAMS, Circuit Judge.

E. Ross King, hereinafter referred to as the defendant, was adjudged guilty by a jury on both counts of a two-count indictment based on 18 U.S.C. §§ 2 and 656. The first count charged him with the misapplication of bank funds as a bank director. The second count, based on a separate transaction, charged him with aiding and abetting another who was a bank director in the misapplication of bank funds. The defendant now appeals and the nature of the issues suggests that we examine more closely the charges in the indictment.

In count 1, the defendant and his brother, Paul W. King, were jointly charged with unlawfully misapplying funds of the Kiowa State Bank in violation of 18 U.S.C. §§ 2 and 656. More specifically, in count 1 it was alleged that as of March 2, 1970, the defendant and Paul King were directors of the Kiowa State Bank, a federally insured bank, and that on that date they unlawfully misapplied monies of the bank by causing a money order to be disbursed in the amount of $50,000 made payable to Applecross Farms and Maddison Farms, which sum was ultimately converted to their personal use.

In count 2, it was alleged that on or about June 14, 1971, Paul King was a director of the Kiowa State Bank and that on or about that date Paul King unlawfully misapplied monies belonging to the bank by causing to be disbursed to one A. Paul Williams the sum of $25,000, $19,516 of which was ultimately converted to the personal use of Paul King and the defendant. The only charge, as such, in count 2 involving the defendant is that he aided and abetted his brother, Paul King, a bank director, in the disbursement of bank funds to the aforesaid A. Paul Williams.

As indicated, the defendant and his brother, Paul King, were jointly indicted. However, before trial Paul King pleaded guilty to count 1 of the indictment, and other charges then pending against him were dismissed. The de-

fendant proceeded to trial on both counts in the indictment, and he was convicted by a jury on both counts. The grounds for reversal are grouped as follows: (1) The evidence is legally insufficient to sustain a conviction on count 2; (2) plain error was committed by the trial court in permitting the defendant's former attorney to testify against him as a Government witness; and (3) the defendant was denied his Sixth Amendment right to the assistance of counsel because of trial counsel's gross incompetence. As concerns the last mentioned matter, needless to say, present counsel for the defendant was not trial counsel.

Although the sufficiency of the evidence argument runs in the main to count 2, we shall first briefly review the Government's evidence as it relates to count 1, in order that the entire matter may be viewed in context. As of March 2, 1970, Paul King was a director of the Kiowa State Bank, located in Kiowa, Colorado, and served as its president. The defendant as of that same date was a director of the bank, but not an officer. Without going into unnecessary detail, on March 2, 1970, the defendant, and his brother, caused a loan in the amount of $50,000 to be made by the bank to Applecross Farms, Inc., on the latter's promissory note. The president of Applecross Farms, Inc., endorsed the check in question in favor of a company controlled by the defendant and the defendant thereafter then drew two checks on his company's account, one check being in favor of his brother, Paul King, in the sum of approximately $25,000, and a second check in the same amount being made payable to himself. Paul King and the defendant then deposited the proceeds of these two checks in their respective personal accounts in the Kiowa State Bank.

As concerns the charge contained in the second count of the indictment, it would appear that as of the date of the transaction upon which the second count is predicated, namely, June 14, 1971, the defendant has resigned as a bank director and was no longer serving in such capacity. However, his brother, Paul King, was still serving as a bank director and president. The fact that the defendant was no

longer serving as a director of the bank is apparently the reason that insofar as the second count is concerned the defendant was only charged with aiding and abetting a director, namely, his brother, Paul King, in the misapplication of bank funds.

In any event, as concerns count 2, the Government's evidence showed that the defendant and his brother formed an entity known as the Kiowa Real Estate Investment Trust and hired A. Paul Williams as a salesman. The three of them, i.e., Williams, the defendant, and his brother, arranged for a loan to Williams from the bank in the sum of $25,000, with Williams giving the bank his promissory note in exchange therefor. In this regard, Williams testified that though he signed the note, he understood that he would not be called on to pay the same, and that payment would ultimately be made by the defendant or his brother. Of the sum loaned, $5,000 was used to pay off a preexisting overdue note of Williams to the bank, and Williams endorsed the balance of the loan, approximately $20,000, over to the defendant. This sum was then traced to the defendant's personal account in a Denver bank.

Williams' testimony was to the effect that at the time of this transaction, the Kiowa Real Estate Investment Trust was experiencing financial troubles, and that the proceeds of this loan were given the defendant to recoup him for advances previously made by him to the trust. While the evidence on this point was not fully developed, the record is such as to permit the inference that the real purpose of this particular loan was to improve the overall financial standing of the Kiowa Real Estate Investment Trust, which, as indicated, was jointly owned by the defendant and his brother.

Although, as will be brought out later, there is some challenge to the sufficiency of the evidence to sustain a conviction under the first count of the indictment, defendant's insufficiency of the evidence argument centers mainly on the second count. In this regard, counsel points out that as of June 14, 1971, the date of the transaction upon which the second count is predicated, the defendant was no

longer director of the bank and that accordingly the only way he could violate 18 U.S.C. §§ 2 and 656 would be by aiding and abetting another, namely, his brother, who was a director, in the wilful misapplication of bank funds. Counsel then goes on to argue that before the defendant can be found guilty as an aider and abettor, the Government must show that there was a principal who was a bank director and who, acting as such, misapplied bank monies. In this connection, then, it is asserted that there is insufficient evidence to show that defendant's brother, Paul King, violated the provisions of 18 U.S.C. § 656 and that such being the case the defendant cannot be guilty of aiding and abetting his brother in any violation. We disagree with this analysis of the record.

The phrase "wilfully misapplies" as used in 18 U.S.C. § 656 has been the subject of considerable judicial discussion. It has been held that the words "wilfully misapplies" have no settled technical meaning, such as "embezzle," for example, and that "misapply" was intended to include acts not covered by the words "embezzle" or "abstract" as such are used in the statute. Batchelor v. United States, 156 U.S. 426 (1895). However, "misapplication" has been distinguished from "maladministration." United States v. Meyer, 266 F.2d 747 (5th Cir. 1959), *cert. denied,* 361 U.S. 875 (1959). At the same time, it has been held that in a prosecution against a bank president for wilful misapplication of bank funds and against a codefendant for aiding and abetting, evidence that the defendant bank president, though professing to secure approval of a loan by the bank, had in fact made the loan to his codefendant without valid consent of the board for the purpose of assisting the codefendant and an already failing trust company, and indirectly to aid a company in which defendant and his codefendant were interested, which loan subjected the bank to an "indefensible risk," was sufficient to sustain a conviction against the defendant bank president as a principal and against his codefendant as aider and abettor. Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935), *cert. denied,* 296 U.S. 653

(1935). Similarly, it has been held that a "misapplication" by a bank director occurs when money is knowingly lent to a fictitious borrower or the director causes a loan to be made for his own interest, concealing his interest from the bank. United Stated v. Fortunato, 402 F.2d 79 (2d Cir. 1968), *cert. denied,* 394 U.S. 933 (1969).

As concerns the facts and circumstances surrounding the loan to Williams in return for his promissory note, both defendant and his brother, Paul King, were present when the loan was consummated. Immediately prior to the actual loan, there had been discussion between defendant, his brother, and Williams concerning the financial plight of the Kiowa Real Estate Investment Trust, in which all three were interested. Williams testified that as of the date of the loan he had another overdue loan with the bank. It was in this setting that the bank loaned Williams $25,000 on his unsecured promissory note. And though Williams signed the note, it was understood that the defendant or his brother would actually repay the loan. As indicated, part of the proceeds went to pay off Williams' overdue note, and the balance Williams endorsed over to the defendant in his brother's presence, to reimburse the former for advances previously made the Kiowa Real Estate Investment Trust. Further, there was evidence that no record was ever made of this loan on the bank's Loan Registry. As above mentioned, though the monies given defendant by Williams were deposited in the defendant's personal bank account, there was evidence to indicate that the real reason for the loan was to improve the financial standing of the Kiowa Real Estate Investment Trust, which was jointly owned by the defendant and his brother. Without further recitation of the Government's evidence, we conclude that under the authorities above cited there is ample evidence to show that under the circumstances Paul King "wilfully misapplied" bank monies by causing the aforesaid loan to be made to Williams, and that the defendant aided and abetted him in the transaction.

Our resolution of this phase of the controversy squares with our recent pronouncement in United States v. Cooper, 464 F.2d 648 (10th Cir. 1972). In that case, we held that an aider and abettor may violate 18 U.S.C. § 656 by assisting a bank official in committing the misapplication and that evidence that the misapplication was for the benefit of the bank officer or the aider and abettor would sustain a conviction against both the bank director and the aider and abettor. As above noted, proceeds from the loan to Williams were placed in the defendant's personal account, and indirectly inured to the benefit of the Kiowa Real Estate Investment Trust, in which both the defendant and his brother had an interest. In sum, then, the evidence is sufficient to sustain defendant's conviction under count 2.

It is next urged as grounds for reversal that plain error was committed by the trial court in permitting the defendant's former attorney to testify as a Government witness. No objection was made upon trial when the attorney was called by the Government and we do not regard the matter as one involving plain error. Rather, the record indicates to us that the failure of trial counsel to interpose any objection based on an alleged attorney-client privilege when the defendant's erstwhile attorney was called as a Government witness was intentional and a part of trial strategy, wherein trial counsel hoped to elicit favorable testimony upon cross-examination which would more than offset any damaging testimony given by the witness on direct examination. Having thus waived any privilege, the defendant cannot at this late date seek to invoke it. Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972).

Elaborating a bit more on this particular phase of the controversy, it is doubtful that the bulk of the testimony from defendant's erstwhile attorney was in fact privileged. In the main the witness testified as to the two corporations which he incorporated at the behest of the defendant and his brother. And then, on cross-examination, he was permitted, over objection, to explain why the defendant and his brother chose to deal in the contemplated purchase of land

and cattle in Kiowa County through corporate entities, rather than openly in their individual capacities. The explanation thus offered was indeed most plausible, but the jury apparently remained unconvinced. Under all these circumstances, *we too remain unconvinced that plain error was committed.*

As an offshoot of the foregoing argument, present counsel claims that because of trial counsel's gross incompetence the defendant was denied his Sixth Amendment right to the effective assistance of counsel. Such is not our view of the record. The fact that the defendant was convicted of course does not prove that he was denied his right to counsel. The record does not suggest to us any bad faith, sham, mere pretense, or want of opportunity for conference and preparation, and in such circumstance we find no denial to the defendant of his constitutional right to counsel. *See* United States v. Davis, 436 F.2d 679 (10th Cir. 1971).

As alluded to above, the defendant makes minor complaint concerning the sufficiency of the evidence as to count 1. In this regard, counsel concedes that when the defendant took the stand and testified in his own behalf, he supplied any deficiency in the Government's case as to whether the defendant was in fact a bank director on March 2, 1970, the date of the transaction upon which the first count was predicated. However, he asks us to overrule our prior decision to the effect that where a defendant offers evidence after his motion for acquittal is denied, the question of the sufficiency of the evidence to sustain an ensuing conviction is thereafter to be determined by an examination of the entire record. This we decline to do. *See* United States v. Bedwell, 456 F.2d 448 (10th Cir. 1972). In our view, the Government did establish in its case in chief at least prima facie, that the defendant was a director of the Kiowa State Bank on March 2, 1970, a fact which defendant then admitted upon cross-examination. The evidence to sustain defendant's conviction on count 1 is amply sufficient.

Judgment affirmed.

SUPREME COURT, U. S.
Supreme Court, U. S.
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No. 73-826

In the Supreme Court of the United States

OCTOBER TERM, 1973

E. ROSS KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in allowing his former attorney to testify as to certain corporate transactions, although no objection was made to the testimony. He further contends that the court below employed an improper standard of review in upholding the trial court's denial of his motion for a judgment of acquittal.

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of misapplication of the funds of a bank of which he was a director, in violation of 18 U.S.C. 656 (Count 1), and of aiding and abetting the misapplication of bank funds, in violation of 18 U.S.C. 2 and 656 (Count 2).[1]

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[1]Co-defendant Paul King, petitioner's brother, was also charged in both counts. He pleaded guilty to Count 1 prior to trial. The Count 2 charge against him was dismissed.

Petitioner was sentenced to concurrent terms of 50 months' imprisonment, with 48 months suspended and two months to be served in a work release program, and was fined $2,500.

Count 1 of the indictment charged petitioner and his brother, Paul King, as directors of the Kiowa State Bank, with having caused a $50,000 loan to be disbursed to Apple Cross Farms and Maddison Farms, which sum was ultimately converted to the personal use of petitioner and his brother. Count 2 charged petitioner with having aided and abetted Paul King in misapplying bank money by causing $25,000 to be disbursed to one A. Paul Williams, of which sum $19,516 was ultimately converted to the personal use of petitioner and his brother.[2]

Petitioner's argument that it was plain error for the court to allow his former attorney to testify for the government was properly rejected by the court below, which found that it was part of petitioner's trial strategy not to object to the attorney's testimony in hope that facts adduced on cross-examination might tend to exonerate him (Pet. App. 7a). Moreover, his failure to claim the attorney-client privilege constitutes a waiver. *United States* v. *Gurtner*, 474 F. 2d 297, 299 (C.A. 9); *Young* v. *Taylor*, 466 F. 2d 1329, 1333, n. 1 (C.A. 10); *Love* v. *United States*, 386 F. 2d 260, 265 (C.A. 8), certiorari denied, 390 U.S. 985.

2. Petitioner also contends that the court below utilized an improper standard of review in determining that the trial court correctly denied petitioner's motion for a judgment of acquittal on Count 2. Attack-

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[2]The charges and evidence are set forth in detail in the opinion below (Pet. App. 2a-4a).

ing the so-called "waiver doctrine," petitioner argues that the appellate court should have reviewed only the record as it stood at the end of the government's case-in-chief, when the motion for acquittal was made. This Court need not reach that issue because, as detailed in the opinion below (Pet. App. 4a-7a), a *prima facie* case had been established as to Count 2 at the end of the government's case-in-chief.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[3]The court below also noted that the government in its case-in-chief proved the commission of the Count 1 offense (Pet. App. 8a).